IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1174

TAXATION WITH REPRESENTATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Taxation with Representation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The memorandum opinion and order of the district court (Appendix A, *infra*, pp. 1a-3a) is not officially reported, but is unofficially reported at 76-2 U.S.T.C. ¶ 9693. The opinion of the court of appeals (Appendix B, *infra*, pp. 6a-19a) is reported at 585 F.2d 1219.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1978 (Appendix C, *infra*, p. 20a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In light of this Court's decision in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is it constitutional for Congress to deny a charity significant tax benefits solely because lobbying is the means by which it promotes its charitable purposes, particularly when lobbying by similarly situated groups is not restricted?

STATUTE INVOLVED

During the relevant period, section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), permitted the following organizations to qualify for tax-exempt status:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

STATEMENT OF THE CASE

Taxation with Representation ("TWR") is a non-profit corporation which was formed in 1970 for the purpose of promoting understanding of the federal tax system and educating Congress and the public with regard to tax matters. It does so by appearing on behalf of the public at legislative and administrative hearings and by assisting members of the academic community in presenting their views at such hearings. Although TWR's purposes are thus exclusively charitable and educational ones within the meaning of section 501(c) (3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), that section is unavailable, since it applies only to organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." Since most of TWR's charitable and educational activities are intended to influence current and proposed tax legislation, the organization's 1974 application for section 501(c)(3) status was denied. 9a-11a.

TWR's ineligibility for section 501(c)(3) status is the direct cause of a number of substantial disadvantages. The most significant of these is the denial of the right to receive tax-deductible donations and foundation grants.[1] As this

[1] For simplicity, petitioner will refer only to section 501(c)(3) in discussing the statutory restrictions on legislative activities. However, the deductibility of donations for federal income, estate, and gift tax purposes depends upon the recipient organization's compliance with a "no substantial lobbying" condition in each relevant statute which is the equivalent of that contained in section 501(c)(3). Internal Revenue Code §§ 170(c)(2) (income tax); 2055(a)(2) (estate tax); 2106(a)(2) (estate tax); 2522 (gift tax). In addition, a foundation will as a practical matter not make grants to organizations which engage in substantial lobbying, since the foundation might be subject to tax liability. 26 U.S.C. § 4945(d).

Court has noted, deductibility "is a prerequisite to successful fund raising for most charitable organizations." *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974). A charity thus suffers serious financial consequences if it is denied tax-exempt status under section 501(c)(3).[2]

Due to the procedural difficulties on which prior efforts to challenge the constitutionality of the section 501(c)(3) restrictions have foundered, this action was brought as a tax-refund suit.[3] Exemption from taxation under the Federal Unemployment Tax Act (FUTA) is directly tied to section 501(c)(3), *see* I.R.C. § 3306(c)(8), and a section 501 (c)(3) organization is accordingly not obliged to pay FUTA taxes. TWR paid FUTA taxes in 1973, 1974, and 1975, refund claims were duly filed, and claims either were disallowed by the IRS or ripened through expiration of the statutory six-month period. *See* 26 U.S.C. § 6532(a)(1).

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[2] The Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1720, amended section 501 to permit certain public charities (other than churches) to have the limits on their lobbying determined by reference to new Code section 4911 and section 501(h), *as amended*. 26 U.S.C. §§ 501(h), 4911. Those amendments apply only to tax years beginning after December 31, 1976, and only to organizations which elect to be governed by the new provisions. TWR has not elected to be covered. Electing organizations are permitted to devote a percentage of their resources to lobbying, up to certain ceilings, rather than adhering to the less certain "substantiality" test of section 501(c)(3). All charities, however, continue to have their lobbying restricted under one standard or the other.

[3] The prior suits were deemed barred by the Anti-Injunction Act. In *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), this Court identified the refund suit as an appropriate vehicle for presentation of challenges to the constitutionality of section 501(c)(3). *Id.* at 762-63 & n.13.

This suit was then filed on December 22, 1975, in the United States District Court for the Eastern District of Virginia. Jurisdiction was based on 28 U.S.C. § 1346(a)(1). TWR alleged that it would have qualified under section 501 (c)(3) but for the unconstitutional lobbying restrictions contained in that section. If it had qualified, TWR would not have been required to pay FUTA taxes, and therefore it sought a refund of $378.29 in FUTA taxes, plus interest according to law. Although the action is thus cast as a suit seeking the recovery of FUTA taxes, what is really at issue is not the $378.29 paid by TWR, but whether Congress can impose on the exercise of First Amendment rights the kind of restrictions contained in section 501(c)(3).

TWR's first constitutional challenge to section 501(c)(3) is based on the First Amendment. TWR contends that because it can enjoy the substantial benefits available under section 501(c)(3) only by severely limiting its lobbying, the lobbying restriction is an "unconstitutional condition" of the type invalidated in *Speiser v. Randall*, 357 U.S. 513 (1958). TWR submits that the restrictions on lobbying contained in section 501(c)(3) also constitute a denial of equal protection, since there is no sufficiently compelling governmental interest to justify the disparity in tax treatment, with respect to lobbying, between charities like TWR and other taxpayers, including business entities, veterans' groups, and fraternal societies, which are not subject to similar restrictions.[4]

---

[4] The statute provides that gifts to fraternal societies are deductible only to the extent that they are used for exempt activities, *see* 15a, but this imposes no restriction beyond that to which all section 501 (c)(3) organizations are subject. By statute, each 501(c)(3) organization must operate "exclusively" for exempt purposes.

Since there were no disputed facts, the case was considered by the district court on cross motions for summary judgment. The court ruled for the Government on two alternative grounds. 1a-3a. It found that TWR was not organized in compliance with section 501(c)(3), and that in any event the restrictions on lobbying are constitutional.[5]

TWR appealed to the United States Court of Appeals for the Fourth Circuit. On the organizational issue, the panel unanimously held that the district court erred in declaring TWR's Articles of Incorporation to be deficient. 8a-13a, 15a. On the constitutional issues, however, a divided court affirmed the entry of summary judgment for the Government. Without mentioning this Court's decision in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the opinion written by Senior Judge Field rejected TWR's claim that section 501 (c)(3) imposes an "unconstitutional condition" on the exercise of First Amendment rights, finding that *Cammarano v. United States*, 358 U.S. 498 (1959), is controlling. Two members of the panel then denied TWR's alternative equal protection claim, citing neither authority nor evidence in the record, but stating that there was "a reasonable basis" for the challenged classifications. 15a.

Circuit Judge Winter dissented in part, concluding that summary judgment for the Government was improper with respect to the equal protection claim. He noted that "Congress has not maintained an attitude of nondiscriminatory tax treatment with respect to lobbying," since business taxpayers are permitted to deduct most lobbying expenses under 26 U.S.C. § 162(e). 16a-17a. Judge Winter also reviewed the favorable tax treatment accorded veterans' organizations and fraternal societies, regardless of the extent of their lobbying activities, and observed that "certainly the government bears a heavy burden to justify" the less favorable treatment of TWR and other charities with respect to lobbying. 19a. Judge Winter noted that the "rational basis" test applied by the majority fell short of the "exacting scrutiny" required in First Amendment cases under such precedents as *First National Bank of Boston v. Bellotti, supra*, and *Police Department v. Mosley*, 408 U.S. 92 (1972). 18a-19a. In light of the important constitutional issues, Judge Winter would have remanded the case to provide the United States another opportunity to prove that the difference in treatment is justified.

[5] TWR also asserted a vagueness claim in the district court, but did not make that argument on appeal.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH *FIRST NATIONAL BANK OF BOSTON v. BELLOTTI* AND OTHER DECISIONS OF THIS COURT.

Following this Court's decision in *First National Bank of Boston v. Bellotti, supra*, it cannot be disputed that section 501(c)(3)'s restrictions on First Amendment activity are unconstitutional unless the statute can survive "exacting scrutiny." 435 U.S. at 786. The United States must shoulder the burden of proving that the restrictions are both closely related to the advancement of a compelling governmental interest and narrowly drawn to avoid unnecessary abridgement. *Id.; Elrod v. Burns*, 427 U.S. 347, 362-63 (1978); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963).

In this case, however, the Government wholly failed to establish that the restrictions on lobbying were designed to, or were likely to, promote a compelling interest, much

less that they were closely related to such a purpose and narrowly drawn to achieve it with minimum interference with First Amendment rights. This case is thus very much like *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786-95, which is controlling, and stands in stark contrast to cases where abridgements of First Amendment rights have been sustained after proof that compelling interests were served thereby. *See, e.g., Buckley v. Valeo, supra; Civil Service Commission v. Letter Carriers,* 413 U.S. 548 (1973). Here the court of appeals did not hold that a compelling interest had been shown; it simply stated in conclusory terms that TWR's "freedom of speech and right to petition Congress are not impaired by the lobbying proscriptions." 14a.

The Government has not challenged the fact that the lobbying which TWR wishes to undertake is protected by the First Amendment, nor could it do so in view of the prior decisions of this Court. *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776-77, 790-92; *Buckley v. Valeo, supra,* 424 U.S. at 48-49; *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-38 (1961); *see Liberty Lobby, Inc. v. Pearson,* 390 F.2d 489, 491 (D.C. Cir. 1968).

The free exercise of TWR's First Amendment rights is restricted by section 501(c)(3), even though the Government has not gone so far as to impose an absolute ban like that invalidated in *First National Bank of Boston v. Bellotti.* A penalty imposed because of the exercise of First Amendment rights is no more permissible than would be a prohibition of free speech. "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in free speech is a limitation on free speech." *Speiser v. Randall,* 357 U.S. 513, 518 (1958). This Court has declared again and again that the Government "may not deny a benefit to a person

on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann,* 408 U.S. 593, 597 (1972). *See, e.g., McDaniel v. Paty,* 435 U.S. 618, 626 (1978); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *Sherbert v. Verner,* 374 U.S. 398, 404-06 (1963).

In *Cammarano v. United States,* 358 U.S. 498 (1959), taxpayers asserted that their expenditures to influence the outcome of a voter initiative directly affecting their businesses were properly deductible under what is now section 162 of the Internal Revenue Code. The Court concluded that denial of the claimed deductions did not violate the Constitution. Since both the Government and the court of appeals relied almost exclusively on *Cammarano* in rejecting TWR's constitutional challenge, 13a-14a, their position can be sustained only if *Cammarano* supports that result. However, even apart from the significant changes in First Amendment law which have taken place since *Cammarano* was decided in 1959, including the decision in *First National Bank of Boston v. Bellotti, supra, Cammarano* does not support the result reached below. That case holds only that *nondiscriminatory* denial of tax deductions for lobbying is permissible, so that taxpayers could be "required to pay for those activities out of their own pockets, as everyone else engaging in similar activities" was then required to do. 357 U.S. at 513. *See* 16a-17a. While the asserted Government interest in equal treatment of taxpayers may have justified denial of deductions in 1959, the equality of tax treatment of lobbying expenses was dramatically altered by the subsequent enactment of Code section 162(e) in 1962. 26 U.S.C. § 162(e). That section allows lobbying expenditures by business taxpayers,whether directed at Congress or at the legislative body of a state or political subdivision, to be deducted for federal income tax purposes

as an "ordinary and necessary" expense of carrying on a trade or business,[6] but it does not ease the restrictions on lobbying by charities like TWR.

The enactment of section 162(e) thus represents a rejection of the supposed public policy of neutrality underlying the *Cammarano* decision, as the Senate Report on the section makes clear:

> It is . . . desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to Members of Congress or legislators at other levels of Government. The presentation of such information to the legislators is necessary to a proper evaluation on their part of the impact of present or proposed legislation.

S. Rep. No. 1843, 87th Cong., 2d Sess. 23 (1962).[7] Moreover, Congress has failed to follow a policy of non-encouragement even with respect to other similarly situated tax-exempt organizations qualifying under section 501, thus further confirming the absence of any compelling federal interest in non-encouragement of lobbying. 17a-18a.

[6] The only restriction on business lobbying deductions contained in section 162(e) is the disallowance of deductions for expenditures in connection with attempts to influence the general public with respect to legislation – "grass roots" lobbying.

[7] It has been estimated that lobbying-related expenditures, which are almost all deducted by businesses under section 162(e), "run into the billions of dollars each year." Opening Statement of Subcommittee Chairman Benjamin S. Rosenthal, *IRS Administration of Tax Laws Relating to Lobbying (Part I)*, Hearings Before a Subcommittee of the House Committee on Government Operations, 95th Cong., 2d Sess. 2 (1978).

Cammarano notwithstanding, the clear pattern which emerges from the Constitution and from the enactment of section 162(e) and other statutes encouraging citizens to fully participate in the processes of government is a devotion to the principle that the free flow of information concerning the needs and preferences of citizens is essential to our system of government.[8] It is therefore apparent that the one justification given for the restriction on speech in this case – the incorrect assumption that the Government still takes a uniform "hands off" approach to lobbying – is erroneous. Even if it were accepted as true, the justification is not compelling. Indeed, it is far less substantial than the support mustered for a number of other restrictions on speech which this Court has struck down in recent years. *See, e.g., First National Bank of Boston v. Bellotti, supra* (interest in preserving integrity of electoral process); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (interest in proper functioning of judicial review commission); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (interest in promoting integrated housing); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (interest in maintaining high professional standards among pharmacists).

[8] It is significant that *Cammarano* dealt with the denial of a *deduction*, which meant that the taxpayers had to bear all, instead of only a portion, of the cost of their lobbying activities. In contrast, the consequence of TWR's lobbying is a denial of deductibility to *all* contributions it receives, not just those used for lobbying. *See* 358 U.S. at 515 (Douglas, J., concurring).

Because of the substantial inconsistencies between the decision below and the principles applied in this Court's controlling First Amendment decisions, the petition for a writ of certiorari should be granted.[9]

II. THE RESTRICTIONS ON LOBBYING BY CHARITIES ARE ALSO IN CONFLICT WITH THIS COURT'S EQUAL PROTECTION DECISIONS.

TWR is denied the benefits of exemption under section 501(c)(3), including the highly important opportunity to receive tax-deductible contributions, solely because of its legislative activities. In contrast, veterans' organizations and fraternal societies enjoy tax benefits which are substantially the equivalent of those for which section 501(c)(3) organizations qualify, but these benefits are not conditioned upon accepting limitations on legislative activities. *See* Code §§ 501(c)(19), 170(c)(3), 2055, 2522 (veterans' organizations); §§ 501(c)(8), 501(c)(10), 170(c)(4), 2522 (fraternal societies); 16a-19a. The net effect is to severely restrict the freedom of charities to participate in legislative affairs,

[9] The court of appeals did not address the Government's assertion that the restrictions on lobbying by charities are somehow designed to preserve the integrity of the legislative process. Even if this asserted purpose had been supported by some evidence or legislative history, the justification would be "belied . . . by the provisions of the statute, which are both underinclusive and overinclusive." *First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 793. The restrictions are overinclusive, since all substantial lobbying leads to a denial of section 501(c)(3) status, whether or not there is any improper attempt to influence legislators. On the other hand, even improper lobbying by non-charities does not affect their tax liability.

while no similar restriction is placed on many other tax-exempt groups.[10]

The classification at issue affects plaintiff's First Amendment freedoms, which occupy a preferred place in our scheme of government. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Accordingly, a discrimination involving these fundamental rights can be sustained only if shown to be necessary to promote a compelling governmental interest. *Police Department v. Mosley*, 408 U.S. 92, 98-99 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335-37 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

Although the court of appeals stated that "unique and compelling societal and governmental goals" justify the preferred treatment of veterans' organizations (15a), neither the court nor the Government ever stated what those supposed purposes are or why they cannot be served in ways that do not discriminate against charities with regard to First Amendment rights. No justification whatever was offered to explain the preferred treatment of fraternal societies. Moreover, as pointed out by Judge Winter, the majority improperly applied a "rational basis" test in evaluating the discrimination, rather than the much more exacting

[10] The fact that lobbying is used as a means of promoting a charitable goal in no way alters the charitable character of the goal. IV *Scott on Trusts* § 374.4, at 2912 (3d ed. 1967); 2 *Restatement (Second) of the Law of Trusts* § 374, at 257, 260 (1959); Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax. 1415, 1422-23 (1973).

standard required by *Police Department of Chicago v. Mosley, supra,* and *First National Bank of Boston v. Bellotti, supra.* 18a.

Because the court of appeals failed to follow these precedents and did not engage in the searching equal protection scrutiny required in First Amendment cases, the writ of certiorari should be issued.

III. THIS CASE PRESENTS SUBSTANTIAL AND RECURRING CONSTITUTIONAL ISSUES WHICH AFFECT ALL CHARITIES.

The constitutional issues presented by this case are by no means unique to TWR. Any charity which desires to secure the crucial right to receive tax-deductible donations must accept limitations on its freedom to promote charitable goals through lobbying. The rights which are constrained – free speech and the right to petition the Government for a redress of grievances – are among those which our system of government values most highly.

The substantiality of the constitutional issues here presented has long been recognized. *See, e.g.,* Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation,* 31 N.Y.U. Inst. on Fed. Tax. 1415 (1973). In fact, a case challenging the constitutionality of the lobbying restrictions contained in section 501(c)(3) reached this Court once before, and the Assistant Attorney General representing the United States stated at oral argument that the Government would "welcome a chance" to have the constitutionality of section 501(c)(3) decided. Oral Argument of Scott P. Crampton, Esquire, *Alexander v. "Americans United" Inc.* (No. 72-1371), Transcript at 22 (January 7, 1974). Only a threshold issue was addressed by this Court at that time. 416 U.S. 752 (1974).

This Court's recent decisions have reaffirmed that it is extremely difficult for the Government to adequately justify restrictions on expression protected by the First Amendment, or discriminations bearing on the exercise of First Amendment rights. The Court should issue the writ of certiorari in this case, so that it may resolve the substantial and recurring constitutional issues raised by the restrictions imposed on lobbying by charities.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 26, 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TAXATION WITH REPRESENTATION, Plaintiff	:	
v.	:	Civil Action
	:	No. 75-891-A
THE UNITED STATES OF AMERICA, Defendant	:	

MEMORANDUM OPINION AND ORDER

Although facially this is a tax refund suit under 28 U.S.C. § 1346(a), the real purpose of the litigation is to obtain judicial review of the constitutionality of tax statutes which allegedly abridge rights guaranteed by the First and Fifth Amendnemts of the Constitution.

The facts are not in dispute.

The plaintiff has a § 501(c)(4) income tax exemption as a social welfare organization.

The Internal Revenue Service has denied its request for a § 501(c)(3) exemption as a charitable and educational organization solely because it devotes a substantial part of its activities to attempts to influence legislation – Therefore contributions made to it are non-taxable, and it is not exempt from the payment of federal unemployment taxes.

Federal unemployment taxes were assessed and paid by the plaintiff for the years 1974 and 1975 – This refund suit followed.

The plaintiff does not deny that it cannot meet the § 501 (c)(3) substantiality test. Instead, it claims the test is unconstitutional because it impairs its rights under the First and Fifth Amendments of the Constitution.

The defendant moved for summary judgment on the ground that the plaintiff had failed to meet the § 501(c)(3) statutory test which requires that the organization's purposes, as stated in its charter, must be expressly limited to purposes permissible under § 501(c)(3), and on the further ground that the substantiality test has neither the purpose nor the effect of infringing First Amendment rights or offending the doctrine of equal protection as incorporated in the Fifth Amendment.

Clearly, the record here made discloses that the plaintiff's charter does not meet the organizational test – Further, the plaintiff concedes its primary activity is lobbying.

Therefore the Court is of the opinion that the defendant's motion for summary judgment ought to be granted on the ground that the plaintiff has failed to meet the § 501(c)(3) organizational test, and

It Is So Ordered.

Having thus disposed of this case, this Court ordinarily would not reach the plaintiff's constitutional claim. However, since both parties apparently want appellate review of the constitutional question, the undersigned – primarily on the basis of Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), and Cammarano v. United States, 358 U.S. 498 (1959), and the other authorities cited in the defendant's brief – holds that the required § 501(c)(3) substantiality test does not infringe upon the plaintiff's First and/or Fifth Amendment rights.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ Oren R. Lewis
United States Senior Judge

September 28, 1976

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Date	
1975	
Dec. 22	COMPLAINT – filed.
1976	
Mar. 8	AMENDED complaint w/certificate of service attached – filed.
Mar. 16	ANSWER to Complaint – filed by the United States.
July 21	FORMAL PRETRIAL: J. Bryan. This matter came on for formal pretrial. Appearances: of counsel. Case set for trial by the Court on 8-26-76. Briefs to be filed within 5 days before trial.
Aug. 20	MOTION for summary judgment together with MEMORANDUM in support of the same – filed by the deft. STIPULATION – filed.
Aug. 20	PLAINTIFF'S motion for summary judgment – filed with BRIEF in support.
Aug. 25	DEFENDANT'S memorandum in response to pltf.'s motion for summary judgment – filed.
Aug. 26	PLAINTIFF'S opposition to defts. motion for Summary Judgment filed.
Aug. 26	TRIAL PROCEEDINGS: J. Lewis. This matter came on for hearing on cross motions for summary Judgment. Appearances of counsel. Motions argued and taken under advisement.

Sept. 28	MEMORANDUM Opinion and ORDER granting defendants Motion for Summary Judgment entered – filed. Copies sent. (ORL)
Oct. 27	NOTICE of appeal or order of 9/28/76 filed by pltf. Copies sent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2418

TAXATION WITH REPRESENTATION,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge.

Argued December 8, 1977 Decided October 30, 1978

Before HAYNSWORTH, Chief Judge; WINTER, Circuit Judge, and FIELD, Senior Circuit Judge.

John Cary Sims (Alan B. Morrison on brief) for Appellant; Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice (Myron C. Baum, Acting Assistant Attorney General; Gilbert E. Andrews, Attorney, Tax Division, Department of Justice; William B. Cummings, United States Attorney and James R. Hubbard, Assistant United States Attorney on brief) for Appellee.

FIELD, Senior Circuit Judge:

The appellant, Taxation With Representation, Inc., (TWR), filed this action for the refund of $378.29 paid with respect to the tax periods 1973-1975 under the Federal Unemployment Tax Act (FUTA). The complaint alleged that TWR is an educational or charitable organization under Section 501 (c)(3) of the Internal Revenue Code of 1954[1] and, accordingly, is exempt from FUTA taxes under Section 3306 (c)(8) of the Code. In seeking the refund, the sole issue raised by TWR is the constitutionality of the restriction on lobbying contained in Section 501 (c)(3). TWR charges that such a proscription violates its rights of free speech and petition under the First Amendment and denies it the equal protection of the law under the Fifth Amendment. The district court granted the Government's motion for summary judgment and ordered the case dismissed. TWR has appealed.

[1] During the period here in question which was prior to the 1976 Amendments to the Internal Revenue Code, 26 U.S.C. § 501 (c)(3) read as follows:

> (c) *List of exempt organizations.*–
>
> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

TWR was incorporated under the District of Columbia Non-profit Corporation Act on July 14, 1970, and its purposes and powers were stated in the articles of incorporation, in part, as follows:

> *Purposes and Powers.* (a) The purposes for which the corporation is organized and shall operate are as follows:
>
> To promote social welfare within the meaning of Section 501 (c)(4) of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Internal Revenue Law) and the regulations pertaining thereto as they now exist or may hereafter be amended.
>
> (b) In pursuance of its purposes the corporation is authorized and empowered to do any and all lawful acts and things consistent therewith including, but without limitation:
>
> To promote the common good and general welfare of the people of the United States by appearing on behalf of the public at legislative and administrative hearings on Federal tax matters and by assisting members of the academic community in presenting their views at such hearings.

On August 20, 1970, TWR filed an application with the Internal Revenue Service seeking exemption under Section 501 (a) as an organization described in Section 501 (c)(4) of the Code.[2] The application for exemption stated its primary activity as follows:

[2] 26 U.S.C. § 501 (c)(4) reads as follows:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

> Taxation with Representation is a public interest lobby that deals solely with Federal tax issues. Its goal is to make sure that the general public is represented by skilled professionals when tax issues are under discussion in Congress and in the Executive Branch.

In a ruling letter dated January 28, 1971, the Internal Revenue Service advised TWR that it was exempt from Federal income taxes under the provisions of Section 501 (c)(4). While this ruling gave TWR the benefit of exemption from Federal income taxes, nevertheless, in such a posture it was liable for unemployment (FUTA) taxes and was also ineligible for tax deductible contributions under Section 170 of the Code.[3]

Exemption from FUTA taxes as well as the advantage of tax-deductibility under Section 170 could be obtained by the taxpayer only by qualifying as an "educational" or "charitable" organization under Section 501 (c)(3), and in 1974 TWR applied to the Service for recognition of such an exemption under that section of the Code. By letter dated June 17, 1974, the Service notified TWR that it did

[3] Prior to the 1976 Amendments to the Internal Revenue Code, 26 U.S.C. § 170 (c)(2) read as follows:

> *Charitable contribution defined.*– For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of–

not qualify for exemption under Section 501 (c)(3) since it was neither organized nor operated exclusively for exempt purposes.[4] The ruling letter concluded as follows:

> (2) A corporation, trust, or community chest, fund, or foundation –
>
> (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State or Territory, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;
>
> (C) no part of the net earnings of which inures to the beneift of any private shareholder or individual; and
>
> (D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

[4] The organizational tests prescribed by the Treasury Regulations require that the articles of incorporation limit the purposes to those which are exempt, Treas. Reg. § 1.501(c)(3) - 1(b)(1)(i)(a), and that they do not expressly empower the organization to engage in activities which are not in furtherance of exempt purposes unless they are an insubstantial part of the organization's activities. Treas. Reg. § 1.501(c) – 1(b)(1)(iii). The Regulations further specify that an organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it to devote a substantial part of its activities to attempting to influence legislation by propaganda or otherwise, or if it is engaged in activities which characterize it as an "action" organization. Treas. Reg. § 1.501(c)(3) - 1(b)(3)(i) and (iii). An organization is an "action" organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. Treas. Reg. § 1.501(c)(3) - 1(c)(3)(ii).

> An analysis of your organizational purpose indicates that you are not organized exclusively for educational, charitable or other exempt purposes as required under section 501 (c)(3) of the Code. Further, your primary activities demonstrate that you are an "action" organization as described in the above cited regulations. Consequently, we rule that you are neither organized nor operated exclusively for exempt purposes under section 501 (c)(3) of the Code. However, this letter does not affect the ruling issued to you on January 28, 1971, which recognized you as being exempt from Federal income tax under section 501 (c)(4) of the Code. In accordance with that ruling, contributions to you are not deductible by the donors under section 170(c)(2) of the Code.

TWR subsequently filed claims for refunds of the FUTA taxes which it had paid and when they were disallowed filed this action.

In granting the Government's motion for summary judgment, the district court concluded that TWR had failed to meet the organizational test of Section 501 (c)(3), holding that the corporation's purposes as stated in its charter must be expressly limited to those permissible under that section of the Code. Observing, however, that both parties apparently desired appellate review of the constitutional question, the district judge addressed that issue and held that the lobbying ban of Section 501 (c)(3) did not violate the constitutional rights of TWR under either the First or the Fifth Amendments. The Government suggests that it is unnecessary for us to reach the constitutional issue since the failure of appellant to meet the organizational test in itself required the dismissal of the complaint.

Concededly, the statute and regulations require that a corportion be both organized and operated exclusively for the specified purposes, and the failure to meet either of these requirements is fatal to a tax exempt status. *C.I.R. v. John Danz Charitable Trust.* 284 F.2d 726 (9 Cir. 1960); Treas. Reg. 1.50(c)(3) - 1(a)(1). However, in applying the organizational test, a court is not necessarily bound by the recitals in the certificate of incorporation, and in an appropriate case may look beyond the four corners of the creating instrument and consider extrinsic evidence.

> To grant or deny tax benefits to organizations upon a basis of recitations in a charter or certificate would not seem to accomplish what Congress was getting at. The issue of "organized," * * * is primarily a question of fact not to be determined merely by an examination of the certificate of incorporation but by the actual objects motivating the organization and the subsequent conduct of the organization. To some degree, "organized" cannot be divorced from "operated," for the true purposes of organization may well have to be drawn in final analysis from the manner in which the corporation has been operated.

Samuel Friedland Foundation v. United States, 144 F. Supp. 74, 85 (D. N.J. 1956). *See also,* 6 J. Mertens, *The Law of Federal Income Taxation* § 34.07, at 27 (1975). TWR contends that under this doctrine of liberality the organizational test should not be inflexibly applied in this case. TWR asserts that because of its lobbying activities it was barred on the face of the statute from receiving a 501 (c)(3) exemption and, accordingly, its only alternative was to incorporate as a 501 (c)(4) organization. It urges upon us that under these circumstances it should not be denied

an adjudication on the merits of its constitutional claims solely because it has failed to pass what it describes as a "purely formal test."

Unquestionably, the record discloses that from the time of its incorporation TWR has doggedly tried to obtain a determination of the constitutional issues raised by it, and the Internal Revenue Service has been well aware of its position. In rejecting TWR's 1975 refund claim, the Service stated that the claim was based on the taxpayer's view that the statute was unconstitutional and observed that "[o]nly the courts have authority to pass on such matters." And the Department of Justice had indicated in a letter to TWR that the constitutional question could "be properly litigated in a refund suit." Now the government contends, however, that such a refund suit is barred because TWR failed to formally "organize" under Section 501 (c)(3). It is clear, of course, that TWR could not meet the "substantial legislative activities" precept of the statute, and under the government's theory it would appear that unless TWR was willing to draft its charter with something less than corporate candor, the merits of its constitutioinal claims could never be reached. We recognize that in the ordinary case where the issue is whether a corporation has met the statutory criteria *vel non,* a reasonable administrative purpose is served by relieving the Service of the obligation to look beyond the formal organization papers. However, where the only issue presented is the constitutionality of the statute, we do not think that administrative or procedural technicalities should preclude the plaintiff from an adjudication on the merits. *Cf. Mathews v. Diaz,* 426 U.S. 67, 76 (1976); *Weinberger v. Salfi,* 422 U.S. 749, 765 (1975).

Turning to the constitutional questions, in support of its First Amendment argument the plaintiff relies primarily upon

Speiser v. Randall, 357 U.S. 513 (1958), where the Court held that a California statute which required a loyalty oath as a condition for a property tax exemption was violative of procedural due process. However, in the context of the issue before us, we agree with the government that *Speiser* is inapposite and that this case is controlled by *Cammarano v. United States*, 358 U.S. 498 (1959), where the Court upheld a regulation under the Internal Revenue Code of 1939 which excluded from deductions as "ordinary and necessary business expenses" any amounts which had been expended "for the promotion or defeat of legislation." The Court, noting that *Speiser* was irrelevant, stated:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pocketbooks, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "'aimed at the suppression of dangerous ideas.'" 357 U.S., at 519. Rather it appears to us to express a determination by Congress that since purchased publicity can influence the fact of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

358 U.S., at 513. In our opinion, *Cammarano* makes it clear that plaintiff's freedom of speech and right to petition Congress are not impaired by the lobbying proscriptions of Section 501 (c)(3) and Section 170 (c)(2). *See Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974).

TWR also contends that its equal protection rights under the Fifth Amendment are denied because Sections 170 (c)(3) and (4) permit veterans organizations and fraternal societies to lobby and still enjoy tax benefits, including the right to receive tax-deductible contributions. We find no merit in the plaintiff's constitutional argument on this point. First of all, we note that contributions to fraternal societies are deductible only when they are used for certain charitable and specified purposes. With respect to veterans organizations, we agree with the government that the unique and compelling societal and governmental goals served by these organizations provide ample justification for the special tax treatment extended to them by the Congress. On the other hand, Congress has a legitimate interest in preventing individuals from making tax-deductible contributions to finance lobbying activities through the means of charities which are exempt from taxes. Assuredly, there is a reasonable basis for the classifications about which the plaintiff complains.

Accordingly, although we disagree with the district court's primary basis of decision, the judgment is affirmed.

AFFIRMED.

WINTER, Circuit Judge, concurring and dissenting:

While I agree with the majority both that TWR sufficiently satisfied the organizational test to permit it to litigate the case on its merits and that the first amendment does not require Congress, by favorable tax treatment, to subsidize lobbying activities, I cannot join in the holding that the district court correctly entered summary judgment for the government on the equal protection claim. I respectfully dissent.

I.

This is a first amendment case. It seems conceded by all that lobbying activities – the right of petition – come within the protection of the first amendment. *See* Eastern R. R. Conference v. Noerr Motor Freight, 365 U.S. 127, 137-38 (1961); Cammarano v. United States, 358 U.S. 498, 512-13 (1959). *See also* First National Bank of Boston v. Bellotti, _____ U.S. ____ (April 26, 1978). Nor do I think that there is any question but that the granting or withholding of favorable tax treatment of contributions on a selective basis because of the substantiality of lobbying activities on the part of the recipient is a regulation of a first amendment right. *See* Speiser v. Randall, 357 U.S. 513, 518 (1958).

Cammarano held valid treasury regulations disallowing the deduction from gross income of sums expended for lobbying purposes and sums spent for the promotion or defeat of legislation as "ordinary and necessary" business expenses. *Cammarano* did so, however, in the context of a blanket, nondiscriminatory prohibition applicable to all corporations and individuals. "*Nondiscriminatory* denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not 'aimed at the suppression of dangerous ideas.'" 357 U.S. at 513 (quoting Speiser v. Randall, 357 U.S. at 519) (emphasis supplied).

Since *Cammarano* was decided, Congress has not maintained an attitude of nondiscriminatory tax treatment with respect to lobbying. Congress enacted 26 U.S.C. § 162(e) permitting taxpayers to deduct from gross income as "ordinary and necessary" business expenses certain lobbying expenses, excluding participation in the political campaign of a candidate for public office and efforts to influence the general public with respect to legislative matters, elections and

referenda, if those expenses were incurred in the course of trade or business.

The same deduction is afforded to the portion of dues of members of organizations attributable to lobbying expenses. I understand this to be the dues of members of labor unions and trade associations to the extent that the dues are expended for permitted lobbying activities. More in point, Congress amended 26 U.S.C. § 170 to provide that charitable contributions made to organizations, a substantial part of the activities of which is lobbying, may receive favorable tax treatment if the organization is (a) a nonprofit organization of war veterans or an auxiliary unit, society, trust or foundation for such organization, or (b) a domestic fraternal society, order or association, operating under the lodge system. In the case of a gift to the latter, there is a special restriction that the gift to be deductible by the donor must be made by an individual and the gift must be used by the donee exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals.

If we leave aside the favorable tax treatment of the portion of dues of members of organizations attributable to lobbying activities, the question before us thus becomes one of whether it is an unconstitutional discrimination for Congress to subsidize the lobbying activities of veterans' organizations and domestic fraternal societies while declining to subsidize the lobbying activities of TWR, an otherwise tax-exempt charitable corporation which would qualify to receive tax-exempt gifts but for its desire to press the ideas that it advocates before legislative bodies. The government argues that the answer is in the negative with respect to fraternal organizations because the favorable tax treatment is accorded only to gifts used for charitable purposes. The

government argues that the answer is in the negative with respect to veterans' organizations because they "serve useful societal goals which have been historically, and probably necessarily, dependent in large part on governmental action . . . [and] the compelling governmental and societal goals and problems dealt with by veterans' organizations required more leeway for lobbying activities in some cases." The majority opinion tracks the government's argument, but I am unpersuaded.

First, the rationale advocated by the government and adopted by the majority is the rational basis test, inappropriate for a case of this nature. As the latest in a long line of decisions, First National Bank of Boston v. Bellotti holds that discriminations of the type with which we are concerned can be sustained only if they survive "exacting scrutiny" and are justified by a "compelling state interest." ___U.S. at _____, _____ (slip opinion, pp. 19, 20). Additionally, with respect to fraternal organizations, the government's argument in essence is that the subsidization of lobbying activities is limited because the lobbying must be for religious, charitable, scientific, literary or educational purposes, etc. The argument is thus as to the quantum of the subsidy; it avoids the justification, if any, for the discrimination between fraternal organizations and TWR. With respect to veterans' organizations, I find nothing in the record to support the finding that the governmental and societal goals and problems dealt with by veterans' organizations are more deserving of subsidy than the governmental goals and problems of taxation with which TWR seeks to deal. Even If I assume that there may be differences sufficiently compelling to justify rendering contributions to veterans' organizations tax deductible, while denying such favorable treatment to contributions to TWR, this record does not disclose them. As

a result, I think summary judgment inappropriate. I would vacate the judgment and remand the case in order to put the parties to their proof.

What I fear that Congress has done since *Cammarano* is to run afoul of the teaching of Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). That case held invalid on equal protection grounds an ordinance that prohibited picketing near a school while the school was in session and for a short period before and after the school session, but exempted from the prohibition picketing of any school involved in a labor dispute. The theory of decision was that while all picketing may be regulated where necessary, "[b]ecause picketing plainly involves expressive conduct within the protection of the First Amendment . . . , discriminations among pickets must be tailored to serve a substantial governmental interest." 408 U.S. at 99. *See also* First National Bank of Boston v. Bellotti, __U.S. at ___ (slip opinion, pp. 18-19). If my premise is correct that the favorable tax treatment afforded to contributions and gifts to fraternal organizations and veterans' organizations and the unfavorable tax treatment afforded to contributions and gifts to other nonprofit charitable organizations by reason of their lobbying activities is a regulation on the exercise of the right to petition, certainly the government bears a heavy burden to justify encouragement of the right to express the views of one and discouragement of the right to express those of the other. Although I have yet to be persuaded that that burden can be met, I would afford the government the opportunity to meet it.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 76-2418

TAXATION WITH REPRESENTATION, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
Clerk

[FILED]
[OCTOBER 30, 1978]

No. 78-1174

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAXATION WITH REPRESENTATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1174

TAXATION WITH REPRESENTATION, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the constitutionality of Section 170(c)(2) of the Internal Revenue Code of 1954 and other similar statutes, which permit deductions for charitable contributions to certain nonprofit organizations on the condition that the recipient organizations refrain from substantial lobbying activities.

The pertinent facts are undisputed and may be summarized as follows: Petitioner is a nonprofit corporation organized "[t]o promote social welfare within the meaning of [Code] Section 501(c)(4)," by "appearing on behalf of the public at legislative and administrative hearings on Federal tax matters and by assisting members of the academic community in presenting their views at such hearings" (Pet. App. 8a). Section 170(c)(2) of the Code allows an income tax deduction for charitable contributions to organizations which are "organized and operated" exclusively for charitable purposes, provided that "no substantial part of [their] activities * * * is

carrying on propaganda, or otherwise attempting, to influence legislation." Virtually identical lobbying restrictions are contained in other charitable deduction provisions in the Code,[1] as well as in Section 501(c)(3) which exempts certain charitable organizations from the income tax. Section 501(c)(4) exempts "social welfare" organizations from income tax whether or not they engage in lobbying. However, only organizations that do not engage in substantial lobbying are entitled to receive tax deductible contributions. See, generally, *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 (1974).

Petitioner is organized and operated primarily to engage in lobbying and therefore is not eligible to receive tax-deductible contributions. It contends that the lobbying restrictions that result in its classification as a social welfare organization under Section 501(c)(4) rather than a charitable organization under Section 501(c)(3) violate its right to free speech and equal protection. Petitioner brought this suit in the United States District Court for the Eastern District of Virginia for refund of federal unemployment taxes to which Section 501(c)(4) organizations are subject but Section 501(c)(3) organizations are exempt. The courts below upheld the constitutionality of the statutory restrictions against substantial lobbying activities by charitable organizations (Pet. App. 2a, 13a-15a).

1. In *Cammarano* v. *United States*, 358 U.S. 498 (1959), this Court upheld the constitutionality of restrictions in the Internal Revenue Code on business expense deductions for lobbying. In so ruling, the Court referred to the similar restriction on lobbying by tax-exempt organizations at issue here and concluded that there was no constitutional bar against Congress' refusal to subsidize lobbying activities in the tax laws. As the Court stated (358 U.S. at 513):

[1]Section 2055(a)(2), 2106(a)(2), 2522.

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " * * * Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

The court of appeals therefore correctly concluded that this case is controlled by *Cammarano*. As it observed, "[i]n our opinion, *Cammarano* makes it clear that [petitioner's] freedom of speech and right to petition Congress are not impaired by the lobbying proscriptions of Section 501(c)(3) and Section 170(c)(2)" (Pet. App. 14a).

Moreover, since *Cammarano* the constitutionality of the identical lobbying restriction in the charitable exemption and deduction statutes has been upheld by every appellate court that has considered the question. *Haswell* v. *United States*, 500 F. 2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F. 2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); *"Americans United" Inc.* v. *Walters*, 477 F. 2d 1169, 1182 (D.C. Cir. 1973), rev'd on other grounds *sub nom. Commissioner* v. *"Americans United" Inc., supra.*[2]

[2]*Haswell* and *Christian Echoes* involved both First and Fifth Amendment contentions. *"Americans United"* addressed only a First Amendment challenge.

2. Petitioner contends (Pet. 7-8) that there is no compelling justification for the neutrality of the Internal Revenue Code with respect to lobbying expenses. But no such justification is required because Congress has not prohibited such activities, but has simply refused to subsidize them through tax benefits. *Cammarano* v. *United States, supra*; see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616-617 (1973); *CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973); *Maher* v. *Roe*, 432 U.S. 464, 475-477 (1977). *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), upon which petitioner heavily relies (Pet. 7), is therefore distinguishable. There, the Court struck down a criminal statute generally prohibiting specified business corporations from underwriting lobbying activities. This case involves no comparable absolute prohibition of lobbying.

Petitioner further argues (Pet. 9-10) that the post-*Cammarano* enactment of Section 162(e) destroys the neutrality of the Internal Revenue Code with respect to lobbying expenses upon which that decision relied. Although Section 162(e) prohibits business expense deductions for political campaign and "grass-roots" lobbying expenditures, it permits deductions for a narrow category of business expenses incurred in appearing before or submitting statements to legislative bodies concerning legislation of direct interest to the taxpayer.

But as the Court of Claims in *Haswell* correctly pointed out, the limited deduction allowed by Section 162(e) can be justified on the grounds that (1) expenses for direct lobbying relate to income-producing activities, and an accurate measure of net income supports some deduction; (2) similar expenses for administrative and judicial appearances are deductible; and (3) it is desirable for legislative bodies to have readily available information on the impact of proposed legislation on the trade or business of affected taxpayers.

These considerations do not apply to the activities of tax-exempt organizations such as petitioner or their donors. Indeed, Congress has a legitimate interest in preventing individuals from making tax-deductible contributions to finance lobbying activities through charities that are exempt from taxes. However, as we have pointed out, *supra*, page 4, the prohibition is not absolute, for even such exempt organizations are allowed to engage in insubstantial lobbying activities and non-partisan analysis of public issues.[3]

3. Finally, petitioner argues (Pet. 12-15) that allowance of certain tax deductible contributions to fraternal and veterans organizations that lobby constitutes unconstitutional discrimination. With respect to fraternal groups, Sections 170(c)(4) and 2522(a)(3) do not allow tax deductible contributions to the organizations themselves. As the court of appeals correctly recognized (Pet. App. 15a), these provisions only permit such organizations to receive tax deductible contributions for distinct funds that are used exclusively for non-lobbying charitable purposes without requiring the formal establishment of a separate Section 501(c)(3) charitable organization.[4]

The provisions governing nonprofit veterans organizations allow tax deductible contributions to such groups organized in the United States without regard to their lobbying activities. See Sections 170(c)(3), 2055(a)(4), 2522(a)(4). But the special tax treatment of veterans organizations arises from significant and compelling governmental concerns. Military personnel and veterans are granted substantial benefits by the national and state legislatures to compensate them for

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[3]See Section 53.4945-2(d)(1)(ii) of the Foundation Excise Tax Regulations (26 C.F.R.).

[4]The dissenting opinion therefore errs in stating (Pet. App. 18a) that fraternal organizations may use tax deductible contributions to lobby for charitable purposes.

disruption of civilian pursuits; to assist the readjustment to civilian life; to make military service more attractive; and to reward those who have served their country in time of peril. *Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972) (Friendly, J.). See also *Fredrick* v. *United States*, 507 F. 2d 1264, 1266-1267 (Ct. Cl. 1974); *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243, 251-252 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Johnson* v. *Robison*, 415 U.S. 261, 378-383 (1974). Compare *Personnel Administrator of Massachusetts* v. *Feeney*, No. 78-233 (argued Feb. 26, 1979). Since these benefits are provided by the legislatures, it is reasonable for Congress to allow veterans organizations to engage in lobbying activities to preserve their benefits without risk of losing their tax deductible contributions. As the court of appeals correctly concluded (Pet. App. 15a), "[t]he unique and compelling societal and governmental goals served by * * * [veterans] organizations provide ample justification for the special tax treatment extended to them by the Congress."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03